IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 62 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

STATE OF GUJARAT

Versus

CHETAN HIMATLAL

Appearance:

MR ND GOHIL, APP, for Petitioner

MR JD AJMERA for Respondent No. 2

CORAM : MR.JUSTICE A.L.DAVE

Date of decision: 30/08/2000

ORAL JUDGEMENT

1. This is a revision application preferred by the State of Gujarat on being aggrieved by an order passed by the learned Additional Sessions Judge, Surendranagar, on 9.2.1995 below application Ex.47 in Sessions Case No.97 of 1993.

2. The facts of the case are that, the opponent is the accused in the Sessions Case, who has been charged for offences punishable under Sections 363, 366 and 376 of the Indian Penal Code. The case of the prosecutrix is that the accused committed the offences punishable under Sections 363, 366 and 376 qua the prosecutrix-Dipti, who was under 16 years of age. For proving the age of the victim, the prosecution relied upon "birth certificate" issued by the school in which the prosecutrix had taken education. During cross-examination, Bhartiben, mother of the prosecutrix appears to have stated that birth of the prosecutrix was registered with Surendranagar Municipality. After the said witness, several other witnesses were examined by the prosecution and, ultimately, by tendering a Purshis (Ex.42) on the 17th December, 1994, the prosecution closed its evidence. It appears that, thereafter, statements of the accused under Section 313 of the Code of Criminal Procedure was recorded. The defence did not examine any witnesses and closed its evidence. The matter went to the stage of hearing of arguments. At that stage also, the prosecution concluded its arguments and then the defence started with its arguments. On the 12th January, 1995, arguments of the defence were heard at length and the matter was adjourned to the 19th January, 1995 when on the 13th January, 1995, an application (Ex.47) came to be tendered by the prosecution seeking indulgence of the Court to summon a witness conversant with birth registration from Surendranagar Nagarpalika as "an additional prosecution witness". The said application came to be rejected by the learned Additional Sessions Judge by passing the impugned order, after considering various decisions. The state is, therefore, aggrieved against the order and has come with this revision application.

3. Heard learned Additional Public Prosecutor, Mr. N.D. Gohil, for the revisioner-State. According to Mr. Gohil, the Court has unfettered and wide powers under Section 311 of the Code of Criminal Procedure to summon any witness at any time. He submitted that, at any point of time prior to the pronouncement of judgment, the powers can be exercised by a criminal Court. He submitted that there is no attempt on part of the prosecution to create an evidence. The evidence, if at all it is there, would be produced by a personnel from the Nagarpalika, which itself is a public body and the birth register itself is a public document maintained in ordinary course of its business. He, therefore, urged that the learned Additional Sessions Judge ought to have allowed the application and summoned the witness as

prayed for. He urged that this Court may exercise revisional jurisdiction by allowing this revision application and setting aside the impugned order and by further directing the Sessions Court to summon and examine the witness.

4. The opponent is represented by learned advocate, Mr. J.D. Ajmera, who is not before this Court.

5. This Court has gone through the impugned order passed by the learned Additional Sessions Judge. The learned Additional Sessions Judge found that this is not a case where powers under Section 311 are required to be exercised by him for arriving at just decision of the case. He has observed thus :-

> "So far as the Court is concerned, it is possible to arrive at just decision of the case on basis of the witnesses already examined. It is not considered necessary by the Court to examine any person as an additional witness."

6. The language employed in Section 311 itself makes it clear that such powers are required to be exercised if the evidence of such witness appears to the Court to be essential to the just decision of the case. Mr. Gohil is at loss to point out any error in this observation of the learned Additional Sessions Judge. The argument of Mr. Gohil that powers can be exercised at any point of time before pronouncement of judgment cannot come to his rescue now. It may be noted that the powers are to be exercised judicially and they are to be exercised in a manner that no prejudice is caused to either of the sides. The powers cannot be exercised to facilitate filling up of lacuna in a party's case. Above all, the powers under Section 311 are supposed to be exercised for just decision of the case.

7. Now, if the instant case is examined, it requires to be noted that the prosecution had closed its case. The defence had also closed its case and the prosecution had concluded its arguments also. Major portion of the arguments of the defence was also over when the prosecution suddenly woke up from its slumber and tendered this application. If such an application is allowed, it would definitely put the defence to a disadvantage because the prosecution has proceeded on premise that no further evidence is to be led by the prosecution. The entire case of the defence is constructed on this premise and, if further evidence is to be led, it would put the defence to a disadvantage. I

may hasten to add that it may not be taken that in no case, such permission be granted after the prosecution has closed its evidence. Such powers can be exercised if the prosecution is able to show that such matter arises ex emproviso (unexpected) which no human ingenuity can foresee. In this regard, I may quote Chief Justice Tendal in Reg v. Frost, (1839) 9C & P 129 :

"There is no doubt that the general rule is that where the Crown begins its case like a plaintiff in a civil suit, they cannot afterwards support their case by calling fresh witnesses, because they are met by certain evidence that contradicts it. They stand or fall by the evidence they have given. They must close their case before the defence begins, but if any manner arises ex emproviso (unexpected) which no human ingenuity can foresee, on the part of the defendant in civil suit or a prisoner in a criminal case, there seems to me no reason why that matter which so arose ex emproviso may not be answered by contrary evidence on the part of the Crown. That rule applies only to a witness called by the Crown and on behalf of the Crown, but we think that the rule should apply to a case where a witness is called in a criminal trial by the Judge after the case for the defence is closed and that the practice should be limited to a case where a matter arises ex emproviso which no human ingenuity can foresee, on the part of a prisoner otherwise injustice would ensue."

(Source: Batuk Lal Commentry on the Code of Criminal Procedure, 1973 - Revised by A.N. Saha, Second Edition)

In the instant case, it cannot be said that the situation has arisen ex emproviso. In the instant case, the prosecution ought to have anticipated a dispute regarding age of the prosecutrix being raised by the defence. The prosecution also ought to have realised that witness-Bhartiben has stated in her deposition that the birth of prosecutrix was registered with Surendranagar Municipality, which is a primary evidence to indicate date of birth of the prosecutrix and, consequently, the age of the prosecutrix at the time of the alleged commission of the offence. After examination of Bhartiben, certain other witness/witnesses have been

examined, whereafter prosecution closed its evidence, the statement under Section 313 of the accused was taken and the defence evidence was also closed. No steps were taken by the prosecution, as a result of which the defence can be presumed to have proceeded on a legitimate inference that the prosecution relies on the birth certificate issued by the school only and, therefore, the learned Additional Sessions Judge was right in rejecting the application. The prosecution, in such circumstances, could not be permitted to fill up the lacuna, if any, in its case occurring due to its lack of vigil.

7.1 A similar situation had arisen before the Punjab and Haryana High Court in the case of Piara Singh v. State of Punjab, 1978 Cr.L.J. 771, wherein it was observed that it would not a proper exercise of discretion under Section 311 of the Code of Criminal Procedure on part of the Trial Magistrate to allow the evidence explaining the delay in lodging the report to be recorded after the accused have closed their defence.

7.2 This Court in the case of State of Gujarat v. Patel Narayan Devji, as reported in 33(1) GLR 530, has observed that the powers of the Court under Section 311 of the Code of Criminal Procedure are wide, but the power must be exercised judiciously and only if the Court is satisfied that in the interest of justice, the power should be exercised. In paragraph 10, it has been observed thus:

> "10.....As held above, power under Section 311, Cr.P.C. is discretionary power and should be exercised by the Magistrate for examining a witness a Court witness and not as a prosecution witness or defence witness."

8. With the above observation of this Court, if we examine the facts of the present case, the prosecution prayed for summoning the witness as an additional witness for the prosecution. The Court, therefore, cannot be said to have committed any error in rejecting the application for summoning this additional prosecution witness after the prosecution evidence is closed, statement of the accused under Section 313 is recorded and the defence evidence is also closed, particularly, when the witness sought to be summoned was not cited as a witness at all.

9. Mr. Gohil has placed reliance on the decision of the Apex Court in the case of Mohanlal Shamji Soni v. Union of India, 32(2) GLR 974 in support of his argument

that Section 311 empowers the Court to invoke its powers at any stage until the judgment is pronounced. While saluting this observation, I agree with the argument of Mr. Gohil that such powers can be exercised at any stage before pronouncement of judgment. But these powers are to be exercised in a manner where no prejudice would be caused to either of the sides. In this very judgment, Their Lordships observed that the second part of the Section does not allow for any discretion, but it binds and compels the Court to take any of the two steps, i.e. summon and examine or recall and re-examine, if the fresh evidence is to be obtained is essential to the just decision of the case. The decision, therefore, cannot help the revisioner/prosecution.

10. In view of the above discussion, there appears not any error committed by the learned Additional Sessions Judge worth calling for an interference by this Court in the exercise of its revisional jurisdiction. The revision application merits dismissal and the same is, therefore, dismissed.

[A.L. DAVE, J.]
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